

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL BURKS,

Defendant-Appellant.

UNPUBLISHED

February 6, 2007

No. 265909

Wayne Circuit Court

LC No. 05-004164-01

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f. Defendant was originally sentenced to 5 to 15 months' imprisonment for the conviction. Defendant was subsequently resentenced to five months to five years' imprisonment. Defendant was sentenced as a fourth habitual offender, MCL 769.12. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that there was insufficient evidence to support his conviction of felon in possession of a firearm. We disagree.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm; (2) the defendant had been convicted of a prior felony; and (3) less than five years had elapsed since the defendant had been discharged from probation. MCL 750.224f; *People v Tice*, 220 Mich App 47, 50-54; 558 NW2d 245 (1996). Possession of a firearm may be actual or constructive and possession may be proved by circumstantial evidence. MCL 750.224f; *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). Elements required for constructive possession of a firearm are proximity to a firearm with indicia of control. *Burgenmeyer, supra*, p 438. This means that a defendant must know the firearm's location and it must be reasonably accessible to the defendant. *Id.*

Here, the parties stipulated that at the time of the incident, defendant was ineligible to possess a firearm. As there was no evidence that defendant had actual possession of the gun, the crux of defendant's appeal is whether defendant had constructive possession of the gun that Detroit Police Officer, Bettie Cabbil, found in the trunk of the vehicle. We hold that the evidence was sufficient to support an inference by a reasonable trier of fact that defendant knew the gun was in the trunk and the gun was reasonably accessible to defendant.

Officer Cabbil testified that when she and her partner arrived at the scene, they found defendant located three houses away from where the vehicle was parked on a neighbor's yard. Officer Cabbil stated that she and her partner investigated the vehicle and discovered the gun in a case in the trunk of the vehicle. The trial court accepted the testimony of complainant, Raynell Freeman, that on the day of the incident, she traveled with defendant while he was driving the vehicle, and that she and defendant were acquaintances. Given that the evidence demonstrates that the gun was found in the trunk of a vehicle that defendant was driving on the day of the incident, we conclude that, viewing this evidence in the light most favorable to the prosecution, a reasonable trier of fact could infer that defendant constructively possessed the gun.

Defendant next argues that his sentence imposed during resentencing should be reversed due to the validity of his first sentence. We conclude that defendant has waived this issue.

Waiver is the "intentional relinquishment or abandonment of a known right" that actually extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Waiver is available in a broad array of constitutional and statutory provisions, and a lawyer has full authority to manage the conduct of trial and make decisions pertaining to the conduct of trial. *Id.* at 217-218.

At resentencing, defense counsel explicitly approved of the judge's imposition of the new sentence. At the resentencing hearing, Judge Edwards informed defense counsel and the prosecutor that defendant's first sentence was "illegal" because it was based on an incorrect statutory maximum. The parties recalled that Judge Edwards had initially sentenced defendant to 5 to 15 months' imprisonment. When Judge Edwards replied that the sentence should have been five months to five years' imprisonment, defense counsel explicitly agreed with Judge Edwards. By explicitly agreeing, defense counsel intentionally relinquished the right to challenge the validity of defendant's second sentence on appeal. Therefore, the issue is waived.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper